

REVISITING AGAINST SETTLEMENT: SOME REFLECTIONS ON DISPUTE RESOLUTION AND PUBLIC VALUES

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*Critics of Owen Fiss's famous 1984 *Against Settlement* widely assumed that he indicted alternative dispute resolution (ADR) as intrinsically incapable of promoting public values. This essay, however, suggests that Fiss offered a socially and historically contingent prediction about ADR's potential to undermine popular commitments to redistributive justice during a period of intense economic liberalization in the United States. To support this rereading, the essay considers how Fiss envisioned the promotion of public values in a different space and time—specifically in international contexts at the turn of this century. Here, he endorsed decentralized, deliberative, and extrajudicial processes, even if he did not quite endorse ADR. The standard reading of *Against Settlement* suggests that Fiss believed that the simple alternation of institutions (from adjudication to ADR) could change our political possibilities in fundamental ways. But once we characterize Fiss's polemic for adjudication and against settlement as, more broadly, an argument for a particular kind of public morality and against an overarching market rationality currently espoused by neoliberalism, then the choice between competing institutional forms becomes less determinate, and—this essay argues—Fiss's overarching challenge to the field of dispute resolution becomes more irresolvable and enduring.*

INTRODUCTION

This essay revisits a longstanding debate about alternative dispute resolution (ADR) and public values. In the early 1980s, Owen Fiss argued that ADR is unable to promote, and moreover is likely to undermine, popular commitments to public values.¹ Fiss described public values as

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1. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) [hereinafter Fiss, *Against Settlement*].

moral ideals about justice, rights, and social cohesion that a public should want to uphold, and which, in any event, the state is obligated to enforce.² By resolving disputes according to individual preferences rather than state law, extrajudicial dispute resolution, he reasoned, stands to replace public values with “individual interests or at best individual morality” and to replace state power with private social ordering.³ Hence Fiss declared himself for adjudication and against settlement.

It is hard to overstate the impact of this provocative claim on the ADR community. *Against Settlement* is reproduced in all of our major casebooks, and many, if not most, ADR proponents have marshaled a response.⁴ Some concede Fiss’s overarching point and agree that certain categories of cases require adjudication, not ADR.⁵ Others argue that Fiss failed to recognize the full range of collective moral values that the state should endorse and that he overlooked values that ADR is more likely than adjudication to promote.⁶ Still others propose that ADR can generate

2. See *infra* Part I.

3. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982) [hereinafter Fiss, *The Social and Political Foundations of Adjudication*]; see also Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *The Forms of Justice*]. Fiss, of course, was not alone in claiming that alternative dispute resolution (ADR) would disregard the public interest or disaggregate conflicts properly understood as collective social problems. See, e.g., Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676–78 (1986); Laura Nader, *The ADR Explosion—The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269, 271 (1988).

4. See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 148–49 (2007); CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 52 (2005) (quotation only); ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 38–45 (4th ed. 2006); LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 21–27 (3d ed. 2005). Together these casebooks are authored by seventeen leading dispute resolution teachers and scholars.

5. See Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 433 (1986) (“One short answer to Fiss is that most ADR proponents make no claim for shunting all, or even most, litigation into alternative forums.”); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985) [hereinafter Menkel-Meadow, *For and Against Settlement*] (“When an authoritative ruling is necessary, I believe Fiss is right—the courts must adjudicate and provide clear guidance for all: Racial discrimination is wrong; oppressive prison conditions are intolerable in a decently humane society.”); see also LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 17 (1987) (“When fundamental constitutional rights are at stake, we properly turn to our judicial system.”); LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 100–01 (2d ed. 2001) (proposing that unlike conflicts of interests, conflicts of “fundamental values” are appropriately resolved through rights-based processes); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 17 (1988) (“Although reconciling interests is generally less costly than determining rights, only adjudication can authoritatively resolve questions of public importance.”).

6. See Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 6–7, 13–15 (1989–1990) (arguing that Fiss and others miss “the public-value argument for mediation,”

precisely the kinds of public values that Fiss argued only public judicial institutions could reliably support.⁷

These are legitimate—indeed compelling—responses when *Against Settlement* is read on its own terms. This essay, however, suggests that this standard engagement between Fiss and ADR threatens to obscure the larger political and social implications of Fiss's ideas. Much of ADR's critical response assumes that Fiss indicted extrajudicial institutions as intrinsically incapable of promoting public values. But rather than offering a structural critique of ADR as an institution, Fiss, I argue, assembled a historical and, in fact, provisional critique of settlement ideologies, which he predicted would erode popular commitments to redistributive justice and the U.S. welfare state. Ultimately, I propose that Fiss's overarching allegiance was less to specific institutional forms than to particular moral ideals. His arguments therefore transcend a straightforward distinction between adjudication and ADR.

To set the stage for this alternative reading, I begin by treating the standard interpretation of Fiss's argument—that ADR is incapable of promoting public values—as a contestable empirical and conceptual claim. In 1982, shortly before Fiss published *Against Settlement*, Richard Abel published *The Politics of Informal Justice*, which includes detailed

grounded in moral development, relationality, and concern for others); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 (1985) (discussing ADR's potential to promote values such as healing, reconciliation, community cohesion, and an understanding of justice as "something people give to one another," rather than receive from government or law); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669–70 (1995) [hereinafter Menkel-Meadow, *Whose Dispute*] (discussing ADR's potential to promote values such as "consent, participation, empowerment, dignity, respect, [and] empathy").

7. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) ("[T]he settlement process can realize some of the values Fiss and I both find in adjudication. . . . but only if they are crafted with this end in mind."); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 947 (2004) (arguing that "deliberative forms of social and political engagement . . . may often contribute as much or more to the evolution of social norms than would a U.S. Supreme Court decision"); Susan Sturm, *Law's Role in Addressing Complex Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35, 54–55 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) ("The worry [of Fiss and others] is that ADR . . . is necessarily private, non-norm generating However, it is important to separate critiques of current practice from normative theories With judicial involvement in assessing and publicizing adequacy criteria, [ADR] has the potential to be norm generating" (citations omitted)); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 3 (disputing the assumption of Fiss and others "that informal conflict resolution is necessarily non-normative, and that it cannot yield more general public values"); Georgios I. Zekos, *Maritime Arbitration and the Rule of Law*, 39 J. MAR. L. & COM. 523, 543 (2008) (discussing "ADR's power to produce responsible public norms"); Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms To Develop Constitutional Norms in Socioeconomic Rights Cases* 2–3 (Ctr. for Human Rights & Global Justice, Working Paper No. 21, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1380351 ("This Article challenges the general perception [developed by Fiss and others] that alternative dispute resolution processes cannot develop public-law norms.").

sociological essays illustrating how, in several countries, extrajudicial dispute resolution contributed to reshaping public values and state power from below according to revolutionary socialist principles.⁸ Rather than individuating conflict, as Fiss suggested, the informal justice institutions described in Abel's collection served to mobilize collective action on behalf of workers, peasants, urban squatters and women during, for example, the 1974–1975 Portuguese revolution,⁹ the Mozambican war to achieve independence from Portugal,¹⁰ and the Allende years in Chile.¹¹ In postrevolutionary China and Cuba, national leaders used informal dispute resolution from above to enculturate local publics in new social and moral orders.¹² My own ethnographic work in Nepal examines how donor-funded NGOs used U.S.-style mediation to criticize the state and hold it accountable to popular demands.¹³

As an empirical matter, it is therefore not at all inevitable that ADR erodes public values. Moreover, the claim that extrajudicial dispute resolution necessarily undermines state power is conceptually one-sided. Anthropologists and sociologists have long reminded us that informal dispute resolution operates within, not outside, systems of state law, and hence is better described on a continuum of overlapping “legalities” rather than as simply an alternative to formal law and state regulation.¹⁴ For example, analysts have studied how informal dispute resolution institutions, even as they reject the formalism of judicial processes, extend state power

8. 2 THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982).

9. Boaventura de Sousa Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice After the 25th of April 1974*, in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 8, at 251.

10. Barbara Isaacman & Allen Isaacman, *A Socialist Legal System in the Making: Mozambique Before and After Independence*, in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 8, at 281.

11. Jack Spence, *Institutionalizing Neighborhood Courts: Two Chilean Experiences*, in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 8, at 215.

12. Sally Engle Merry & Neal Milner, *Introduction to THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 8 (Sally Engle Merry & Neal Milner eds., 1995) (summarizing various ethnographic studies).

13. For example, in one mediation training that I observed, the trainer began his training by lighting three candles: the first dedicated to the “martyrs of democracy,” the second to “fighters for human rights,” and the third to “victims of [state] torture.” He then proceeded to describe the desperate state of human rights in Nepal: “When will this end? We don’t know. Even the government does not obey the Constitution. We must protect the human rights guaranteed in our Constitution, especially women’s rights. We must not suppress women’s rights in the mediation process. This is what this training is for.” Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 297 (2006); *see also* Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261, 1262 (2008) (suggesting that the mediation of domestic violence cases in Nicaragua by women’s advocacy groups can infuse “private, individualized, and neoliberal” approaches to conflict resolution with “a public, institutional, and structural character”).

14. *See, e.g.*, Christine B. Harrington, *Informalism as a Form of Legal Ordering*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 378, 389–90 (Keith E. Whittington et al. eds., 2008).

through their symbols, forms, and techniques (e.g., the table, the neutral third party) and through their reliance on material mechanisms of control (e.g., state funding, case referrals).¹⁵ Other theorists, instead of characterizing formal and informal dispute resolution as opposites or even as complementary systems, have observed how both these institutions organize their power in intrinsically homologous ways.¹⁶

Given these counterexamples, how might Fiss respond? It is possible that he would persist in indicting ADR as unable to promote public values *tout court*. But a far more plausible and, I think, more interesting understanding of Fiss's work emerges when we contextualize what may appear as *Against Settlement*'s ahistorical and categorical claims. I suggest that in *Against Settlement*, Fiss offered a prediction about the kind of political work he thought U.S. ADR was likely to achieve. Writing in the late 1970s and early 1980s, he ventured that adjudication could preserve popular commitments to the U.S. welfare state, whereas ADR seemed likely to reinforce then-nascent efforts to privatize state functions by promoting individual interest maximization rather than collective social justice.¹⁷

To support this reading, I consider how Fiss envisioned the promotion of public values in a different space and time, specifically in international contexts at the turn of this century. Here, he endorsed decentered, deliberative, and extrajudicial processes, even if he did not quite endorse ADR.¹⁸ To be sure, Fiss did divide dispute processing into two distinct camps—but naming them adjudication and ADR misses the scope and ambition of his ideas. For Fiss, the more salient (and universalizing) distinction was between moral deliberation and interest satisfaction. On the one hand, he defended adjudication *and* extrajudicial deliberative processes designed to produce belief in extant moral values. On the other hand, he opposed extrajudicial dispute resolution processes animated by the idea that moral values do not exist apart from the ongoing negotiation and bargained-for exchange of competing interests and individual aspirations.

Understanding *this* divide—not adjudication versus ADR but moral deliberation versus interest satisfaction—helps explain the legacy of Fiss's contribution to the field of dispute resolution. In this essay, I take Fiss's concerns about privatization as prescient—the social changes he envisioned, and associated with ADR, have only increased in relevance, if

15. See, e.g., CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 169–71 (1985); Richard L. Abel, *Introduction* to 1 *THE POLITICS OF INFORMAL JUSTICE*, *supra* note 8, at 6–7; Merry & Milner, *supra* note 12, at 4–5, 26–28. Conversely, other analysts have shown how extralegal processes (e.g., grievance procedures) can influence judicial interpretations of formal law. See, e.g., Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 432–45 (1999).

16. See, e.g., Peter Fitzpatrick, *The Impossibility of Popular Justice*, in *THE POSSIBILITY OF POPULAR JUSTICE*, *supra* note 12, at 453, 463; see also Annelise Riles, *User Friendly: Informality and Expertise*, 27 LAW & SOC. INQUIRY 613 (2002).

17. See *infra* Part I.

18. See *infra* Part II.

also in complexity, today.¹⁹ The standard reading of *Against Settlement* suggests that Fiss believed that the simple alternation of institutions (from adjudication to ADR) could change our political possibilities in fundamental ways. But once we characterize Fiss's polemic for adjudication and against settlement as an argument for a particular kind of public morality and against an overarching market rationality currently espoused by neoliberalism, then the choice between competing institutional forms becomes less determinate, and Fiss's overarching challenge becomes more irresolvable and enduring.

I. PUBLIC VALUES AGAINST THE DECLINE OF THE WELFARE STATE: ADJUDICATION, ADR, AND THE AMERICAN STORY

In this Part, I describe how the concept of public values informed Fiss's assessment of dispute processing institutions. To that end, I read Fiss's critique of ADR retrospectively, in light of a larger body of work in which he developed his famous claim that adjudication exists "to give meaning to public values, not merely to resolve disputes."²⁰ I use the terms dispute resolution or ADR to refer to dispute processing institutions that are extrajudicial and consensual (such as mediation, where parties consent to the outcome, or arbitration, where parties consent to the process). I use the term adjudication to refer to dispute processing institutions that are juridical, adversarial, and determined by public officials interpreting state law.²¹

In *Against Settlement*, Fiss offered the following reasons to oppose ADR: it legitimizes exploiting distributional inequalities as part of the dispute resolution process;²² it individuates conflicts that involve groups and

19. For a suggestive argument linking contemporary forms of ADR to neoliberal ideas and practices, see generally Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009). See also UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 79 (2008) (describing today's "new specialties in conflict resolution," as part of "a hegemony of neo-liberal concepts of economic relations structured very much in an American corporate style"); Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION 371, 376 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (arguing that new ADR initiatives to address workplace conflict are "formed almost exclusively around the concerns of managers: cutting costs, enhancing productivity, and containing conflict").

20. Fiss, *The Forms of Justice*, *supra* note 3, at 44.

21. I adapt these terms from Fiss, *The Forms of Justice*, *supra* note 3. In that article, Fiss distinguishes dispute resolution from his ideal of adjudication—that is, a form of dispute processing that aims primarily to give meaning to public values and to reform the structural conditions of our social life. By contrast, Fiss uses the term "dispute resolution" to describe forms of public and private adjudication (as well as other settlement technologies) that aim primarily to restore private relations. See *id.* at 28–31; see also Fiss, *Against Settlement*, *supra* note 1, at 1075; Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 122–26. Hence, for Fiss, ADR is a paradigmatic example of what he calls dispute resolution more generally.

22. Fiss, *Against Settlement*, *supra* note 1, at 1076–78.

institutions;²³ it aims for a single moment of resolution rather than ongoing structural remedies;²⁴ and—the criticism that is the subject of this essay—it privatizes public values.²⁵ By contrast, Fiss argued that adjudication and, more specifically, “the guiding presence of the judge,” struggles, albeit imperfectly, against all these reasons to reject settlement.²⁶

Because Fiss wrote *Against Settlement* as a comparative polemic, linking each of his critiques of ADR to a corresponding defense of adjudication, many ADR proponents responded in kind, by seeking to unpack his comparative assertions. For example, Carrie Menkel-Meadow proposed a hardheaded empirical investigation of “when settlement?”²⁷ Frank Sander suggested that Fiss’s thesis could “form the core of a seminar devoted to the proper role of courts and their alternatives in our society.”²⁸ Michal Alberstein endeavored to flip Fiss’s arguments to show how dispute resolution could serve his ends as well as (or as poorly as) or better than adjudication.²⁹

But if scholars proceed immediately to contest Fiss’s arguments on empirical grounds—that is, by analyzing the costs and benefits of two competing institutions under existing social conditions—they may miss, or at least misdescribe, what is ultimately at stake for Fiss. Despite his comparative locution, Fiss’s defense of adjudication reflects an idealist social project more than an assessment of empirical reality.³⁰ Like the judges he most admired, Fiss straddled the “world of the ideal and the world of the practical.”³¹ And although his theories emerged out of his assessments of social practice, he rejected the pragmatist’s claim that no

23. *Id.* at 1078–79.

24. *Id.* at 1082–85.

25. *Id.* at 1085–87.

26. *Id.* at 1077.

27. Menkel-Meadow, *For and Against Settlement*, *supra* note 5, at 498 (“For me, the more fruitful inquiry is to ask under what circumstances adjudication is more appropriate than settlement, or vice-versa. In short, when settlement?”); Menkel-Meadow, *Whose Dispute*, *supra* note 6, at 2664–65 (“For me, the question is not ‘for or against’ settlement . . . but *when, how, and under what circumstances* should cases be settled?” (footnote omitted)).

28. Frank E. A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229, 232 (1984) (referring specifically to Fiss, *The Forms of Justice*, *supra* note 3).

29. See MICHAL ALBERSTEIN, *PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION* 201–11 (2002).

30. Fiss conceded as much. For example, in 1986 he wrote, “I advanced [an account of adjudication] a few years ago, and nowadays I wonder whether I am . . . guided more by a duty to see the best in life rather than by a tough assessment of the facts.” Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11–12 (1986) [hereinafter Fiss, *The Death of the Law?*]; see also OWEN FISS, *THE LAW AS IT COULD BE* x, xiii (2003) [hereinafter FISS, *THE LAW AS IT COULD BE*] (explaining that he republished a series of essays that defend “the rightful place of adjudication in American society” and the “conception of the judge as the paramount instrument of public reason” because “the present malaise cannot last forever. Sometime soon, as the new century unfolds, we will once again turn to law and accord the judiciary the respect it is due”); cf. ALBERSTEIN, *supra* note 29, at 200 (similarly explaining Fiss’s defense of adjudication in terms of ideals).

31. Fiss, *The Forms of Justice*, *supra* note 3, at 58.

truth exists apart from interpretation and practice. As his debates with Stanley Fish made clear, Fiss argued that moral values *exist* (apart from practice) and are enshrined in authoritative texts.³² For Fiss, our current state of affairs, however it diverges from these values and texts, is no reason to relinquish—it provides the very reason to pursue—the struggle for the world as it could be. “To settle for something,” he wrote, “means to accept less than some ideal.”³³

What was the ideal that Fiss refused to relinquish? Fiss devoted a significant amount of scholarship to defending the redistributive capacities of what I will call the welfare state and what Fiss called the activist state.³⁴ Prior to writing *Against Settlement*, he warned that dispute resolution would likely play a key role in broader social, political, and cultural shifts away from the welfare state and civil-rights-era liberal legalism, and towards the present (if also contested) configuration of neoliberal ideas and practices.³⁵ Specifically, he predicted that ADR—with its emphasis on “maximiz[ing] the ends of private parties” rather than adjudicating individual and social rights³⁶—would accommodate broader social efforts to replace the law with markets as a primary means of resolving conflict, and replace the state with citizens as the agents primarily responsible for social well-being. In his words:

The resurgence of the dispute resolution model is not an isolated phenomenon, but occurs within a larger political context characterized by a renewed interest in market economics and theories of laissez-faire and, more generally, by a reaffirmation of the theory of the social contract. At the heart of each phenomenon is a renewed belief in the private character of all ends.³⁷

In this and other writings, Fiss associated dispute resolution with the public policies of the Reagan era, which promoted markets as a solution to many social problems and envisioned the state as primarily a watchdog of

32. See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 763 (1982) [hereinafter Fiss, *Objectivity and Interpretation*] (calling upon readers to “[affirm] the truth of that which is being denied—the idea that the Constitution embodies a public morality”); see also Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) (critiquing the arguments of *Objectivity and Interpretation*); Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) (responding to *Fish v. Fiss*).

33. Fiss, *Against Settlement*, *supra* note 1, at 1086.

34. See, e.g., Fiss, *Objectivity and Interpretation*, *supra* note 32, at 741. I use the term welfare state, despite its checkered history, in order to capture Fiss’s aspiration that the state assume primary responsibility for social well-being, and because scholars today argue that the neoliberal state is decidedly activist in extending market values to social, political, and economic life. See, e.g., Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 39–44 (2005) (“[Unlike] classical economic liberalism, neoliberalism does not conceive of either the market itself or rational economic behavior as purely natural. Both are constructed—organized by law and political institutions, and requiring political intervention and orchestration.”).

35. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3.

36. Fiss, *Against Settlement*, *supra* note 1, at 1085.

37. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 127.

efficient market exchange.³⁸ Adjudication, by contrast, appeared to him able to constrain these new policies and practices. In his view, adjudication differed from dispute resolution in three crucial respects. First, adjudication is founded on principles of social justice, rather than individual consent. Second, it upholds the social premises of the welfare state rather than those of the “night-watchman state.”³⁹ Third, and for these two reasons, it reflects and reinforces public rather than private values. I briefly set forth each of these claims.

A. Consent Versus Social Justice

Fiss argued that, unlike adjudication, dispute resolution derives its legitimacy from the principle of individual consent.⁴⁰ It treats the resolution of disputes as a private matter that occurs when individuals invite a third party to restore social relations that are disrupted by conflict.⁴¹ Dispute resolution therefore requires that individuals are treated in a procedurally fair manner (to preserve their capacity to consent),⁴² but it does not necessarily require that resolutions themselves are just.⁴³ Hence Fiss saw dispute resolution as embodying Friedrich Hayek’s mantra that there is no “social justice” (or, rather, no responsibility for the social effects of outcomes achieved through dispute resolution processes); “there is only a justice of individual conduct” and there is equal “treatment under the same rules.”⁴⁴

By contrast, Fiss argued that judicial institutions “can seek their justifications in domains other than consent.”⁴⁵ Courts are legitimate, not because those who come before them consent to their procedural rules

38. In 2003, Fiss wrote: “I was able to see the connection between the new popularity of the dispute resolution model and the growing disdain for government power in all its forms—a development that would reach a zenith during the 1980s and the presidency of Ronald Reagan.” FISS, *THE LAW AS IT COULD BE*, *supra* note 30, at 48; *see also* Fiss, *The Death of the Law?*, *supra* note 30.

39. *See* Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 127 (borrowing the phrase from ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974)).

40. Fiss, *The Forms of Justice*, *supra* note 3, at 37–39; Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 127.

41. Fiss, *The Forms of Justice*, *supra* note 3, at 18, 29.

42. *Id.* at 39.

43. *See, e.g.*, JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 142 (1987) (“It is irrelevant to the mediator if the terms of agreement are inefficient, shortsighted, or less than what one party could have gained in a winning lawsuit. What is relevant is that the parties have decided that, given their scheme of priorities, they can live with the solution, and the mediator is confident that the proposed terms will endure in practice.”), *quoted in* James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Ruminant on Mediator Values Beyond Self-Determination and Neutrality*, 5 *CARDOZO J. CONFLICT RESOL.* 65, 79 (2004). *See* Coben, *supra*, for a survey of similar views by mediation scholars and practitioners.

44. Friedrich A. von Hayek, *The Principles of a Liberal Social Order*, in *THE ESSENCE OF HAYEK* 363, 379 (Chiaki Nishiyama & Kurt R. Leube eds., 1984).

45. Fiss, *The Forms of Justice*, *supra* note 3, at 38.

and/or substantive outcomes, but because they dispense justice.⁴⁶ And whereas dispute resolution proponents endorse the direct participation of parties to a conflict in the name of self-determination and procedural fairness,⁴⁷ Fiss maintained that judges should sacrifice some individual participatory rights for the sake of social justice.⁴⁸ In fact, he boldly reasoned that individuals can experience freedom through adjudication (when it promotes structural reform) far more profoundly than they can through directly participating in the resolution of their own disputes.⁴⁹ In this paradigm, not consent but *truth* constrains power: “[A]djudication requires that there exist constitutional values to interpret, just as much as it requires that there be [procedural] constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power.”⁵⁰

B. *The Night Watchman State Versus the Welfare State*

Fiss argued further that these divergent understandings of the role of consent in dispute resolution versus adjudication reflect divergent understandings of the state. Dispute resolution (which sanctifies individual consent) reflects a conception of the state with minimal authority to provide for social well-being. In this conception, the state functions to provide

46. See *id.* at 38–39. I should add that, for Fiss, courts are legitimate provided that they dispense justice within the confines of a democratic political system. See *infra* note 102 and accompanying text.

47. See, e.g., Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 479–80 (2007); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787 (2001). See generally Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004) (studying disputants' preferences for direct participation and control).

48. Consider Fiss's criticism of *Martin v. Wilks*, 490 U.S. 755 (1989), which affirmed the U.S. Court of Appeals for the Eleventh Circuit's decision to overturn a structural decree designed to end race-based discrimination in a city fire department because white firefighters did not receive a hearing on their claim. Fiss argued that, at times, judges could and should limit individual participatory rights to serve the welfare and substantive rights of others. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 978–79 (1993) [hereinafter Fiss, *The Allure of Individualism*]; see also *id.* at 972–73, 978 (“We may value individual participation in structural litigation, but only to serve instrumental rather than dignitary ends: to insure that all interests are accounted for and that the strongest arguments are made on their behalf.”).

49. For example, Fiss argued that

[a] conception of adjudication that strictly honors the right of each affected individual to participate in the process seems to proclaim the importance of the individual, but actually leaves the individual without the institutional support necessary to realize his true self. In fact, the individual participation axiom would do little more than throw down an impassable bar . . . to the one social process that has emerged with promise for preserving our constitutional values and the ideal of individualism in the face of the modern bureaucratic state—structural reform.

Fiss, *The Forms of Justice*, *supra* note 3, at 44; cf. Fiss, *Against Settlement*, *supra* note 1, at 1080–81 (“The authority of judgment arises from the law . . . thus we allow judgment to bind persons not directly involved in the litigation even when we are reluctant to have settlement do so.”).

50. Fiss, *Objectivity and Interpretation*, *supra* note 32, at 763.

security and to fashion institutions that guarantee the proper operation of markets.⁵¹ Or, as Fiss explained, the role of the state is “to develop those conditions that will allow private individuals to engage in commerce and to satisfy their own needs.”⁵² Fiss described this understanding of the state as an extension of the social contract tradition of nineteenth century classical legal thought and laissez faire capitalism.⁵³ For him, dispute resolution tracks core premises of social contract theory and hence of the night watchman state: “ends are private, power is legitimated through individualized consent, and . . . natural harmony generally prevails.”⁵⁴

By contrast, adjudication (which sanctifies social justice) envisions a democratic state with a vastly different conception of state power. Here, the state actively participates “in our social life, supplying essential services and otherwise structuring the very terms of our existence.”⁵⁵ Rather than require “the individualistic, unanimous consent exalted by the social contract tradition,”⁵⁶ the welfare state requires only that individuals consent generally “to the system,” not to any specific institution.⁵⁷ Indeed, individuals broadly authorize, even welcome, “the pervasive and almost continuous interventions of a state committed to improving the welfare of its citizenry.”⁵⁸ Adjudication, as Fiss envisioned it, safeguards and enforces the promises of the welfare state by seeking to remedy the social structures that create the conditions for individual harms,⁵⁹ and by caring for the social consequences of procedural rules.⁶⁰

C. Private Versus Public Value

For these reasons, Fiss argued that adjudication promotes public values, and ADR does not. But he also posed a chicken-and-egg problem. He reasoned that whether a society embraces adjudication rather than dispute resolution turns on whether it *believes in the existence* of public values. Thus he argued that the advent of ADR not only reflects—but, more dangerously, reinforces—Americans’ increasing disbelief in extant public values. In his words:

Ever since the 1970s we have felt increasing doubts about the existence of public values . . . and the dispute resolution model of adjudication, like the night-watchman state, accommodates those doubts. Both afford an easy haven for all those who would deny or minimize the role of public

51. See, e.g., DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

52. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 127.

53. *Id.* at 127–28.

54. *Id.* at 127.

55. *Id.* at 128.

56. *Id.*

57. Fiss, *The Forms of Justice*, *supra* note 3, at 38.

58. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 128.

59. Fiss, *The Forms of Justice*, *supra* note 3, at 18–28 (advocating for a special type of adjudication he called structural reform).

60. See Fiss, *The Allure of Individualism*, *supra* note 48, at 978–79.

values in our social life and the need for governmental power to realize those values.⁶¹

And:

We have lost our confidence in the existence of the values that were the foundation of the litigation of the 1960s and, for that matter, in the existence of any public values. All is preference. This . . . seems to be the crucial issue. Only when we reassert our belief in the existence of public values, our belief that [these] values . . . can have a true and important meaning, one that must be articulated, implemented—and yes, discovered—will the role of the courts in our political system become meaningful or even intelligible.⁶²

Fiss described public values as “the values that define a society and give it its identity and inner coherence.”⁶³ He did not set forth the content of these values in substantive detail,⁶⁴ but as these two quotations suggest, he distinguished public values from subjective preference.⁶⁵ For him, public value is normative value—not necessarily what someone wants out of life, but rather what they should want; what is “true, right, or just.”⁶⁶ More specifically, *public* value defines a common normative standard that all people who comprise the social space of “the public” should share. Subjective preference, by contrast, is what people actually desire.⁶⁷ It is not encapsulated in a symbol of moral rightness but rather, characteristically, by the idea of maximizing human welfare. It begins with people’s desires, whatever these are, and then seeks to help them achieve these preferences by obtaining, for example, the most pleasure for the least pain, or the most goods for the least effort.

Fiss argued that by empowering subjective preference as a legitimate standard to resolve conflict, dispute resolution entrenches the “sociologically impoverished universe” of the night watchman state in which “there are no public values or goals, only the private desires of

61. FISS, *THE LAW AS IT COULD BE*, *supra* note 30, at 58.

62. *Id.* at 15.

63. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 128. He suggested further that public values are characteristically “embodied in an authoritative legal text, such as the Constitution.” *Id.* at 121; *cf.* Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 256, 259 (2007) (describing the U.S. Constitution as “the embodiment of the public morality of the nation . . . laden with a special normative value that derives from the role it plays in defining our national identity—what it means to be American—and in articulating the governing principles of our society”).

64. For a critique of Fiss’s unwillingness to describe public values in specific substantive terms, see Clare Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN’S L.J. 1, 4 (1989).

65. See, e.g., Fiss, *The Forms of Justice*, *supra* note 3, at 15, 58.

66. *Id.* at 9 (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART* 58 (P. M. S. Hacker & J. Raz eds., 1977)).

67. On this distinction between public/normative value and private/economic value, see DAVID GRAEBER, *TOWARD AN ANTHROPOLOGICAL THEORY OF VALUE: THE FALSE COIN OF OUR OWN DREAMS* 1–2 (2001).

individuals.”⁶⁸ By contrast, he argued that adjudication begins not with private desires but with “state power embodied in the judge.”⁶⁹ Judges transcend private preference and “speak the law”⁷⁰ because they are constrained by professional norms and procedural rules that “enable and perhaps even force the judge to be objective.”⁷¹ Hence, judges are able to give “a true account” of public values and, in turn, to defend the public good.⁷²

Numerous scholars have argued that Fiss’s conceptualization of adjudication overstates the coherence and rationality of the judicial decisionmaking process.⁷³ Others have argued that, as an empirical matter, “the push for privatization has come from within the courts themselves.”⁷⁴ But I wish to remain within Fiss’s description of adjudication and make a different point.

Fiss did not suggest that ordinary individuals could not or would never use extrajudicial processes to generate public value in the enlightened or public-spirited manner of the judge. It is just that individuals “need not”⁷⁵ and therefore, he inferred, they probably won’t.⁷⁶ Thus, in 1985, when

68. Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 3, at 122–23.

69. Fiss, *The Forms of Justice*, *supra* note 3, at 41.

70. *Id.* at 29.

71. *Id.* at 12. Fiss argued that judges “are caught in a network of so-called ‘disciplining rules’ which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which [judges] are part.” Fiss, *The Death of the Law?*, *supra* note 30, at 11. Fiss explained further that these rules “constrain, not determine, judgment,” *id.*, and allow “the person offering the interpretation” to “transcend [their] particular vantage point.” Fiss, *Objectivity and Interpretation*, *supra* note 32, at 744.

72. See Fiss, *The Forms of Justice*, *supra* note 3, at 12. For Fiss, keeping the peace, resolving disputes, and maximizing private interests are merely secondary—and not necessary—consequences of this primary judicial function. *Id.* at 29–31.

73. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5–6 (1984) (summarizing the work of various legal scholars who argue that the model of legal reasoning endorsed by Fiss is socially and historically contingent, indeterminate and contradictory, and cannot provide objective answers to legal questions or explain the actual process of judicial decision making).

74. Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 894 (1993); see also Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 176 (2003) (arguing that our contemporary generation of judges is “suspicious of adjudication” and prefers “processes sometimes styled ‘alternative dispute resolution’ (ADR) and sometimes ‘dispute resolution’ (DR),” which are “committed to the utility of contract and look[] to the participants to validate outcomes through consensual agreements”). Consider, for example, Ohio Supreme Court Chief Justice Thomas Moyer’s description of the function of adjudication in a state constitutional case ordering an overhaul of public school financing. He writes, “Courts exist as forums for the resolution of disputes. Ideally, parties involved in litigation are able themselves to negotiate a settlement of their disputes, through mediation or otherwise. When that does not occur, it is the responsibility of the court to render a final judgment” *DeRolph v. State*, 780 N.E.2d 529, 536 (Ohio 2002) (Moyer, C.J., dissenting).

75. Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 249 (1989) [hereinafter Fiss, *The Law Regained*].

76. Elsewhere he argues that courts “are more likely to do justice than any other institution.” Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517, 520 (2001)

Andrew McThenia and Thomas Shaffer argued that ADR was potentially *all about* the production of normative value through participatory discoveries of justice.⁷⁷ Fiss responded that their account was “not wrong, just beside the point.”⁷⁸ That is, Fiss did not assert, as ADR scholars read him to claim, that settlement cannot “play *any* role in promoting social justice.”⁷⁹ Instead, he argued that a justice-promoting role for ADR, though possible, was highly unlikely save for consensual deliberations within the “insular religious community,” already bound by sacred social norms.⁸⁰ Fiss therefore dismissed McThenia and Shaffer’s account of ADR as irrelevant, even dangerous, because it distorted “the character of our social [read national] life and the role that the state and its courts must play in our search for justice today.”⁸¹ Most importantly, their account offered Fiss no ammunition to defeat what he saw as ADR’s most pressing danger: its “assault upon the activist state” and its participation in “the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of [public] norms.”⁸²

In sum, writing about the United States in the 1980s, Fiss described adjudication as an elaborate institutional process designed to articulate and enforce justice on behalf of a national public, and he described dispute resolution as an institutional process designed to reflect the subjective preferences of individual users. He reasoned further that because dispute resolution serves individual preferences through consensual and democratic processes, it cannot master individual preferences that seek “a social and political culture dominated by the privatization of all ends.”⁸³ For similar reasons, Fiss was as hostile to critical legal theorists’ suggestive blending of law and politics as he was to U.S. ADR. For him, both politics and dispute resolution serve subjective preference. The politician, like the mediator, need only “give the people what they want simply *because* it is what they want. Judges, on the other hand, have no authority other than to decide what is just.”⁸⁴ Hence, Fiss argued that to defeat democratic processes that threatened to undo the welfare state, we need state power. Without the state—and, more specifically, without a public judiciary authorized to

[hereinafter Fiss, *The Autonomy of Law*] (emphasis added); see also Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985) [hereinafter Fiss, *Out of Eden*].

77. McThenia & Shaffer, *supra* note 6, at 1664–66.

78. Fiss, *Out of Eden*, *supra* note 76, at 1669–70.

79. Seul, *supra* note 7, at 953 (emphasis added) (reading Fiss).

80. Fiss, *Out of Eden*, *supra* note 76, at 1669.

81. *Id.* at 1669, 1671.

82. *Id.* at 1672 (quoting McThenia & Shaffer, *supra* note 6, at 1665 n.33 (summarizing a conversation with Milner Ball)). Although Ball uses the phrase “community norms,” I replaced the word “community” with “public,” which better describes the national public that Fiss envisioned.

83. Fiss, *Objectivity and Interpretation*, *supra* note 32, at 741.

84. Fiss, *The Law Regained*, *supra* note 75, at 249; see also Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 204 (2007) [hereinafter Fiss, *Between Supremacy and Exclusivity*] (arguing that judges aim “to arrive at a correct interpretation [, not] the one that most or all people agree with. . . . [or] accept”).

articulate public values insulated from market forces—all we have are “politics dominated by the market,” and we have dispute resolution.⁸⁵

Thus, as a national domestic project, Fiss aspired to implement a progressive social agenda through the adjudication of public values and through the cultivation of popular belief in the existence of those values and in the adjudicatory process itself.⁸⁶ He therefore idealized a special kind of state power: neither the brute imposition of sovereign will nor the pure reflection of popular will. In place of both, he promoted a vision of adjudication that emanates from a single center of national authority, and is constrained at that center by highly professional procedural rules and substantive norms that promote objectivity and reason, and legitimated at the periphery, not through coercion or force, but through collective ideational commitments. Understood in this fashion, Fiss opposed U.S. ADR because it was not authorized to demand—nor was it required to aspire to produce—popular belief in collective moral values. Hence, he concluded, ADR was unlikely to “bring a recalcitrant reality closer to our chosen ideals.”⁸⁷

II. PUBLIC VALUES AGAINST NEOLIBERALISM: HUMAN RIGHTS, POPULAR DELIBERATION, AND THE INTERNATIONAL STORY

At the same time that Fiss was promoting adjudication as a defense against deregulation, privatization, and laissez faire capitalism in the United States, development economists were peddling a similar tripartite package of neoliberal ideas abroad. In 1983, Deepak Lal published *The Poverty of ‘Development Economics,’* which advocated replacing Keynesian welfarist developmental regimes in third world states with regulatory policies to promote free markets.⁸⁸ In the early 1980s, a powerful group of international financial institutions (the World Bank, the International Monetary Fund, the Inter-American Development Bank, the U.S. Executive Branch), whose policies were dubbed the “Washington consensus,” began requiring third world states to adopt measures, such as fiscal austerity, trade liberalization, downsizing of the public sector, and the privatization of publicly owned industries, through conditions on credit.⁸⁹

In the United States, Fiss argued that without national courts to promote collective standards of morality, the resolution of social conflict would track shifting private preferences and utilitarian market calculations. How,

85. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 794 (1987).

86. Cf. FISS, THE LAW AS IT COULD BE, *supra* note 30, at ix (“Today . . . [f]aith in public reason has been shattered, and so has the belief that the judiciary is able or willing to use reason to give concrete meaning to constitutional values.”).

87. Fiss, *Against Settlement*, *supra* note 1, at 1089.

88. See generally DEEPAK LAL, THE POVERTY OF ‘DEVELOPMENT ECONOMICS’ 1–2 (1983) (arguing against “*Dirigiste Dogma*”).

89. BEN FINE, SOCIAL CAPITAL VERSUS SOCIAL THEORY: POLITICAL ECONOMY AND SOCIAL SCIENCE AT THE TURN OF THE MILLENNIUM 132–35 (2001) (describing “[t]he Washington consensus: from modernisation to neo-liberalism” and providing a concise review of this history).

then, did he envision resisting the encroachment of market ideologies in global contexts lacking supranational judicial bodies, or within developing states beset with weak courts? This question is complex because in the late 1980s and 1990s, international development agencies exported adjudication and ADR to enhance markets and democracy and social justice in the form of human rights. Development agencies championed the creation of strong judiciaries to protect private property and enforce private contracts, as well as to enforce civil, political, and other human rights.⁹⁰ Moreover, they routinely prescribed ADR to strengthen (rationalize, streamline, decentralize) weak and inefficient national courts.⁹¹

When Fiss turned his attention to international development at the turn of this century, he did not criticize the exportation of any particular settlement technologies. Rather, he dissected efforts by development agencies to align the promotion of markets with the promotion of democracy and human rights. He censured neoliberal policymakers and the institutions of the "Washington consensus" for instrumentalizing law to serve market ends.⁹² And he aimed to preserve a vision of law that embodies autonomous public values and hence a vision of law that trumps the exigencies of markets.⁹³

But articulating a conception of public value on a global scale proved tricky, not least because Fiss reasoned that markets, democracy, and human rights are *all* sources of public value that people in developing countries should want to uphold.⁹⁴ For example, Fiss described market-led growth as "an important public value, especially in the developing world."⁹⁵ Yet, he argued that the value of markets should yield to that of human rights. "Human rights," he asserted, "are an embodiment of justice. . . . [and] stand on another plane altogether from the market or neoliberalism in general."⁹⁶ But although Fiss insisted that human rights should trump markets, even human rights, he argued, should at times yield to the value of democracy:

90. See David Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74, 81–84 (David M. Trubek & Alvaro Santos eds., 2006); see also Thomas Carothers, *The Problem of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15, 19–20 (Thomas Carothers ed., 2006).

91. See Cohen, *supra* note 13, at 309–11; see also Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 572–77 (2007) (describing how the U.S. Agency for International Development (USAID), the American Bar Association, and the World Bank promote various ADR projects as part of their rule-of-law initiatives). For examples, see SCOTT BROWN ET AL., *ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 1* (1998) (analyzing "uses of ADR related to the rule of law" in Bangladesh, Bolivia, South Africa, Sri Lanka, and the Ukraine), and Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 347–72 (2000) (discussing USAID-sponsored ADR interventions in Bolivia).

92. See Fiss, *The Autonomy of Law*, *supra* note 76, at 517–20.

93. *Id.* at 520–21.

94. Here, Fiss describes public values not, or not only, as norms shared by existing national publics but as approaching universal standards of value.

95. Fiss, *The Autonomy of Law*, *supra* note 76, at 521.

96. *Id.* at 522–23.

[W]e can save law from the clutches of neoliberalism and the market only by affirming, as human rights advocates indeed do, the autonomy of law and its devotion to justice. But then we must also confront the threat that law, as an autonomous institution, poses to democracy and ponder afresh the value of the rule of law. Justice, alas, may not be the friend of either the market or democracy.⁹⁷

As a result of this tension between justice (here embodied in human rights) and democracy, Fiss refrained from categorically endorsing the adjudication of human rights in international courts and tribunals.⁹⁸ Elsewhere, he argued that within democratic nation-states, courts are “sufficiently embedded within a larger system of democratic governance to meet the objection that judicial review is undemocratic.”⁹⁹ Because citizens within democratic states consent generally to the national system, of which courts are a part, citizens need not consent to specific judgments.¹⁰⁰ But this formula breaks down “in the case of human rights because, while human rights are of a global character, the processes of collective self-determination are essentially local in nature—they take place in the neighborhood, city, province, or nation-state.”¹⁰¹ Thus Fiss concluded that international courts—which are not (now) democratically accountable to a national or local public—are “a loss for democracy even though these tribunals further justice.”¹⁰²

Put differently, Fiss reasoned that the inescapable tension between justice and democracy becomes acute beyond the boundaries of the democratic nation-state. Perhaps to mediate this tension, he turned to popular deliberation.¹⁰³ Strikingly, he defined human rights as universal values but of a *democratic and dialogic* character.¹⁰⁴ Human rights, he argued, “have a universalistic quality,” and are “of equal force . . . the world over.”¹⁰⁵ Yet their meaning, Fiss stipulated, depends on the willingness of democratic publics to discuss and imagine the moral communities they wish to become.¹⁰⁶

Here is how Fiss develops this (rather complex) claim in *Human Rights as Social Ideals*.

97. *Id.* at 517.

98. *Id.* at 523–26.

99. Fiss, *Between Supremacy and Exclusivity*, *supra* note 84, at 201.

100. *See id.*; *see also* Fiss, *The Forms of Justice*, *supra* note 3, at 38.

101. Fiss, *The Autonomy of Law*, *supra* note 76, at 523.

102. *Id.* at 526.

103. For a broad overview of contemporary legal scholarship that seeks to “reconcil[e] democracy and rights” through theories of popular deliberation, *see* Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 309–12 (2003).

104. *See generally* Owen M. Fiss, *Human Rights as Social Ideals*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 263 (Carla Hesse & Robert Post eds., 1999) [hereinafter Fiss, *Human Rights as Social Ideals*].

105. *Id.* at 266; *see also* Owen M. Fiss, *Perspective: The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 66 (1993) (describing human rights as “transcendent values”).

106. Fiss, *Human Rights as Social Ideals*, *supra* note 104, at 265–66.

First:

Viewing human rights as social ideals, transcending any existing legal order, enables us to use those rights as an independent standard by which to judge all social practices, including the law. As social ideals, human rights can move the law toward the creation or recognition of certain claims as a matter of positive law, both international and domestic, yet they will always stand apart from the world as it is presently constituted. They serve both as a standard for evaluating what is and as a reminder of what could be.¹⁰⁷

But as he describes human rights as universal and transcendent—"an independent standard by which to judge *all* social practices"¹⁰⁸—he also insists that

human rights are not derived from some understanding of human nature They are instead the articulation of aspirations immanent in a culture. As ideals, human rights define the community within which people want to live, but have their roots in the community in which they in fact live. . . . They [are] expressive of a rather concrete understanding of the needs of a democratic society.¹⁰⁹

Finally, in this uneasy effort to finesse a position on human rights that endorses universalism and contextualism, truth and democracy, but neither natural law nor positivism, Fiss looks to popular deliberation.¹¹⁰

[I]t should be remembered that establishing the truth of a social ideal is a radically different task than establishing the truth of a claim that is presented to and enforced by the state. Because a claim must provide the justification for state action that is always concrete and often swift and decisive, the methods for establishing such a claim's truth must be sharply determinate. In contrast, the search for truth in the realm of ideals is *almost conversational*. Not endless, it contemplates a *process of deliberation and discussion that reaches conclusions by small, but steady, increments*.¹¹¹

Here, then, in contemporary international and transnational development contexts, Fiss suggests that the promotion of public values—the kind of values he believes can constrain market ideologies—can and should take place in popular domains outside of adjudication.

Thus, in writings from the turn of this century, Fiss argued that in social spaces where public values do not emanate from a single center of national authority legitimated through robust democratic processes, we should all act as judges, authorized, even obligated, to engage in special reasoned dialogues about human rights and public values that proceed through "small, but steady, increments."¹¹² In 1979, Fiss claimed that "[o]thers may

107. *Id.* at 267.

108. *Id.* (emphasis added).

109. *Id.* at 274.

110. *See id.* at 273–74.

111. *Id.* at 275 (emphasis added).

112. *Id.*

search for the true meaning of our constitutional values, but when they do, they will have to mimic—if they can—the process of the judge.”¹¹³ In 2003, however, he submitted that in international contexts, the responsibility of the judge “devolves on each of us, as members of the world community, to make a disinterested judgment as to whether the norms of the [U.N.] Charter have been honored.”¹¹⁴ Lacking state enforcement, these extrajudicial deliberative processes should seek truth not through “sharply determinate” methods, but rather through conversational, discursive, and democratic ones.¹¹⁵ Even more, Fiss appeared to suggest that these discursive processes can, and potentially will, progress incrementally towards universal social ideals rather than disintegrate into subjective preference or radical moral difference.

Dispute resolution scholars, familiar only with *Against Settlement*, may find Fiss’s turn to extrajudicial deliberation surprising. But his explicitly deliberative understanding of public values is actually quite consistent with his larger body of work. In 1989, only five years after the publication of *Against Settlement*, Fiss offered to reconcile with critical legal scholars: he could endorse their attention to the politics of law if they could endorse his understandings of politics as a deliberative kind of moral expression—not “politics as market behavior, as nothing more than the expression of interest and preferences,” but rather “a more noble and idealistic politics, one that is more an expression of public values, or of principle, or of rights, than of private preference.”¹¹⁶ Even earlier, in 1986, Fiss prefigured this position; he wrote, “analytic arguments wholly internal to the law can take us only so far. There must be something more—a belief in public values and the willingness to act on them. Where will that belief come from?”¹¹⁷ In other words, Fiss himself described courts as contextual institutions—for him, it was not enough that courts perform state power by giving expression to moral values encoded in state law; they must also *receive* expressions of moral values, which, in turn, are generated by cultivating popular deliberation and belief. When courts are disconnected from robust democratic processes, popular deliberation appears especially important, even necessary, to engage ordinary individuals in creating the kinds of social-moral commitments that Fiss would use to counteract the values of neoliberalism.

113. Fiss, *The Forms of Justice*, *supra* note 3, at 16.

114. Owen Fiss, *In the Shadow of War*, 58 U. MIAMI L. REV. 449, 452 (2003).

115. Fiss, *Human Rights as Social Ideals*, *supra* note 104, at 275.

116. Fiss, *The Law Regained*, *supra* note 75, at 246–47; *cf.* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 90, at 19, 72 (“If law is politics . . . by other means . . . it seems to me also true that politics is law by other means, in the sense that politics flows as much from the unmeetable demand for ethical rationality in the world as from the economic interests or pure power lust with which it is so often discursively associated.” (citing Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77 (H. H. Gerth & C. Wright Mills eds., 1946))).

117. Fiss, *The Death of the Law?*, *supra* note 30, at 14.

Fiss never extended an olive branch to ADR—in the scholarship I surveyed, he endorsed deliberative democratic processes, not extrajudicial dispute resolution. Today, however, ADR scholars regularly, if suggestively, conflate these two institutional ideals. Carrie Menkel-Meadow, for example, argues that “modern democratic processes can be thought of as mediation writ large.”¹¹⁸ Other legal scholars now promote ADR in explicitly Fissian (that is, public-value-promoting) terms: Jane Stromseth, David Wippman, and Rosa Brooks suggest that extrajudicial dispute resolution can help create “rule of law cultures” in post-conflict states in which people “come to believe” in legal process and universal human rights.¹¹⁹ Development professionals, they argue, can use informal and culturally familiar dispute resolution processes to empower “local reformers to change traditional norms” and strengthen “broader rule of law messages.”¹²⁰ These and other scholars thus propose to promote legal consciousness and human rights through extrajudicial dispute resolution rather than through law exclusively understood as formal judicial institution or enforceable state code.¹²¹ As such, these scholars aim to reconfigure ADR into a form that Fiss could potentially endorse.

Thus far, I have read Fiss’s critique of ADR not as an abstract institutional comparison with adjudication, but rather as a critique of a certain kind of political privatization. Indeed, I suggested that we cannot understand his arguments outside of the particular historical (domestic and international) neoliberal contexts against which he was writing. Moreover, I questioned the common contention that Fiss believed that extrajudicial dispute resolution mechanisms are inherently incapable of producing public values—to the contrary, in international contexts, Fiss proposed that deliberative democratic processes should strive to achieve exactly that. Fiss, however, distinguished between processes that invite disputants to make their ends commensurable, fungible, and thus subject to reciprocal

118. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 30 (2000); see also Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, DISP. RESOL. MAG., Winter 2006, at 18; see also *infra* note 139.

119. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 311, 334–40 (2006).

120. *Id.* at 337.

121. See, e.g., *id.* at 334–40; see also Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 334 (arguing that ADR can build “faith and confidence in the legal systems” and “foster respect for rule of law”); Mariana Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 97 (2008) (arguing that participatory private dispute resolution mechanisms “can . . . transform cultural attitudes and norms toward the law in Latin America”). For scholarship generally analyzing the transnational spread and “vernacularization” of human rights discourse through extralegal means, see SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006). See also Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 LAW & SOC. INQUIRY 595 (2002).

trades,¹²² and processes that invite disputants discursively to engage with collective moral truths. Given this distinction, I described Fiss's overarching argument as conditional: he appears willing to support extrajudicial processes *if* they aim, as he suggests, to establish the truth of social ideals through dialogue and reason.¹²³

The final question this essay considers is what this rereading suggests for the contemporary practice and theory of ADR. One potential answer is that ADR proponents should openly espouse the promotion of public values. In so doing, they can embrace, not merely refute, Fiss's critiques, and they can embrace, not merely deflect, his social justice project. In the following concluding Part, I simultaneously advance and question this prescription.

III. "FOR HUMANITY AND AGAINST NEOLIBERALISM"¹²⁴

Early proponents of ADR made significant concessions to the arguments of *Against Settlement*. Even as they defended ADR, many flatly endorsed adjudication for conflicts they deemed to involve the public's interest.¹²⁵ In fact, critics of Fiss's normative assumptions came primarily from outside the ADR movement. Critical legal scholars, for example, directly challenged Fiss's account of legal reasoning; they relentlessly described judicial outcomes as products of contingency, contradiction, and choice, rather than legal necessity or claims to objective justice.¹²⁶ Robert Cover, moreover, insisted that adjudication was power, not truth, nor even a broad-based social consensus about public values.¹²⁷ By contrast, most ADR

122. For an analysis of the conceptual underpinnings of this vision of ADR, see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 522–27 (2008) [hereinafter Cohen, *Negotiation*].

123. See Fiss, *Human Rights as Social Ideals*, *supra* note 104, at 275.

124. This popular Zapatista slogan served to rally left activists to convene international gatherings under the same name. See, e.g., Zapatista National Liberation Army, *A Call from Chiapas: "First Declaration of La Realidad for Humanity and Against Neoliberalism"* (1996), reprinted in NOT FOR SALE: IN DEFENSE OF PUBLIC GOODS xxi–xxiii (Anatole Anton et al. eds., 2000). The Zapatistas are known (among other things) for their *consultas*, or decision making through consultation and the search for consensus. For a brief description, see Interview by Pablo Salazar Devereaux, Ana Laura Hernández, Eugenio Aguilera, and Gustavo Rodríguez with Subcomandante Marcos, Zapatista National Liberation Army, in the Lacandon Jungle, Mexico (May 11, 1994), <http://www.struggle.ws/mexico/ezln/anmarin.html>.

125. See *supra* note 5. Andrea Schneider recently argued an analogous point in a transnational context. Writing about dispute resolution processes in postconflict states, she proposed that "the rule of law must first be established in courts" before we can rely on consensual dispute resolution processes to promote values such as equality and justice. Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 311 (2009).

126. For a few examples, see generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Joseph W. Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275 (1983); and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

127. In 2003, when he republished *Against Settlement*, Fiss included this draft response by Cover, which he found in Cover's papers after his death:

proponents vocally resisted Fiss's evaluations of their own programs and techniques, yet refrained from attacking Fiss's overarching normative descriptions of the adjudicatory process.¹²⁸

On one level, the ADR community's more moderate response makes sense. ADR's basic method—interest-based dispute resolution (IBDR)—built into its foundation Fiss's distinction between public and private value. Articulated perhaps most concisely by Vilhelm Aubert, IBDR distinguishes value-based conflicts from resource-based conflicts, or what Aubert calls conflicts of *interests*.¹²⁹ Negotiation scholars, in turn, developed Aubert's idea that, unlike value-based conflicts, interest-based conflicts are better (more creatively, productively, efficiently) resolved through consensual bargaining paradigms than through adjudication.¹³⁰ To be sure, some IBDR proponents aimed to transform value-based conflicts into interest-based ones by, for example, moving the locus of disagreement from ideology and morality to economics (and, hence, in Fiss's terms, aimed to privatize conflict).¹³¹ But many early ADR proponents limited the application of their techniques to conflicts among individuals disputing, for example, the allocation of material resources or business or personal relationships, and reserved large-scale value controversies for courts.¹³²

I am insistent that the apparent capacity of the courts to fashion a life of shared meaning is always seriously compromised and often destroyed by the violence which is the implicit or explicit threat against those who do not share the judge's understanding. I, like Owen, celebrate the achievements of federal courts in destroying apartheid in America. . . . But it is Fiss not Cover who is the romantic here. It is Fiss who supposes that these achievements emerge out of a shared community of interpretation that is national in character. I support those efforts because I believe them right and justified, because I am sufficiently committed to them to join with others in imposing our will on those who disagree. At times the federal courts have been our allies in those commitments. There is every reason to believe that such a convergence of interests was temporary and accidental; that it is already changing and will soon be a romantic memory of the sublime sixties.

FISS, *THE LAW AS IT COULD BE*, *supra* note 30, at 92.

128. Some contested Fiss's description of adjudication, but often on empirical grounds. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 434 (1986) ("Fiss's position is seriously weakened by his failure to offer proof that court judgments are more just."); Menkel-Meadow, *Whose Dispute*, *supra* note 6, at 2669 ("Those who criticize settlement suffer from . . . 'litigation romanticism,' with empirically unverified assumptions about what courts can or will do." (quoting Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1173 (1995))).

129. Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. CONFLICT RESOL. 26, 27–28 (1963).

130. See, e.g., THOMPSON, *supra* note 5, at 100–01; URY, BRETT & GOLDBERG, *supra* note 5, at 16–18.

131. See, e.g., Roger Fisher, *Fractionating Conflict*, 93 DAEDALUS 920, 922–23 (1964); see also Gabriella Blum & Robert H. Mnookin, *When Not To Negotiate*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 101, 110 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

132. For a brief overview of early dispute resolution literature, see Cohen, *Negotiation*, *supra* note 122, at 509–10. Even early pioneers of large-scale public dispute resolution distinguished "distributional disputes" from disputes about the "definition of constitutional or legal rights." SUSSKIND & CRUIKSHANK, *supra* note 5, at 17. For example, in their 1987

On another level, however, ADR provides at least an implicit critique of Fiss's normative framework, insofar as ADR theorists routinely question the existence of the kinds of antecedent or universalizing values that Fiss assumes and promotes. Roger Fisher and William Ury, for example, define truth as an "argument—perhaps a good one, perhaps not—for dealing with . . . difference."¹³³ Other ADR practitioners ask their interlocutors to suspend belief in objective facts and consider how their perceptions of facts and fairness are informed by prior experience, affect, and subjective preference.¹³⁴ Some even view this professional disposition as a badge of distinction. As one scholar-practitioner explains, "we accept what we can work with, putting aside questions of whether we can know anything about truth [T]he mediator cannot realistically think of herself as . . . a knower, or . . . a seeker, of truth."¹³⁵ Thus Alberstein astutely observes that

[w]hat would have been considered radical and subversive in the legal realm—the claim that perception of facts is always subjective, that our judgments are full of biases, and that it is all a matter of settling and the way we present a matter—is assumed here [in the ADR realm] nonchalantly as a state of nature, as a problem we can try and then master.¹³⁶

ADR's radicalism—that is, its opposition to Fissian liberalism and its critique of universalizing values—was likely invisible to many legal scholars (perhaps including many ADR proponents themselves) because, until very recently, few ADR theorists claimed to produce social norms or aspired to resolve large-scale social problems.¹³⁷ Today, however, ADR

book on resolving public disputes, Susskind and Cruikshank explain that although they are "firmly convinced that consensus-building strategies can help" resolve disputes about "tangible gains and losses," they prefer to "leave it to others to decide whether consensual approaches to dispute resolution can (or should) be used in resolving constitutional questions." *Id.* But see *infra* note 150 and accompanying text.

133. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 23 (Bruce Patton ed., 1981); see also DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 132 (1999), quoted in ALBERSTEIN, *supra* note 29, at 271 ("The truth is, there is no 'right choice.' There is no way to know in advance how things will really turn out. So don't spend your time looking for the one right answer about what to do. It's not only a useless standard, it's crippling.").

134. See, e.g., Sheila Heen & Douglas Stone, *Perceptions and Stories*, in THE NEGOTIATOR'S FIELDBOOK, *supra* note 131, at 343, 344–45 (encouraging negotiators to recognize how their sense of "what happens" in the world is constructed through perceptual feedback loops and informed by prior experiences and expectations); Nancy A. Welsh, *Perceptions of Fairness*, in THE NEGOTIATOR'S FIELDBOOK, *supra* note 131, at 165, 171 ("[F]airness—whether distributive or procedural—is largely a matter of perception."); see also Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-modern, Multi-cultural World*, 1 J. INST. FOR STUDY LEGAL ETHICS 49, 69–72 (1996) (proposing models of dispute resolution that are "mindful of the post-modern and multi-cultural critiques of legal knowledge").

135. David E. Matz, *Ignorance and Interests*, 4 HARV. NEGOT. L. REV. 59, 81 (1999).

136. ALBERSTEIN, *supra* note 29, at 313.

137. See *id.* at 257, 301 (describing the private orientation of significant strands of ADR scholarship and practice); cf. Andrea Kupfer Schneider & Christopher Honeyman,

proponents routinely recommend horizontal, consensual, and extralegal forms of dispute resolution to pursue a wide range of social ends including promoting good governance¹³⁸ and democratic participation,¹³⁹ facilitating nation-building and reconciliation in the aftermath of civil war,¹⁴⁰ and helping marginalized people challenge social hierarchies and oppressive cultural norms.¹⁴¹

If ADR's orientation was once in tension with Fiss's commitment to producing public values, these shifts in ADR's political and social ambitions suggest this orientation is changing. Indeed, accompanying these shifts are new debates within the discipline about morality and reason. Some theorists promote ADR as a better means to achieve precisely the kinds of social-moral ideals that Fiss envisioned. For example, Amy Gutmann recommends extrajudicial deliberative dispute resolution—not adjudication—to resolve political controversies “where important interests or ideals of many individuals are at stake.”¹⁴² She explicitly distinguishes her model, however, from the “amoral” framework of IBDR that treats “agreement [as] a necessary and sufficient standard of dispute resolution.”¹⁴³ ADR proponent Jeffrey Seul makes a similar claim. He suggests that extrajudicial dispute resolution processes can generate “just, consensual resolution of disputes involving deep moral disagreement” if

Introduction: “A Canon of Negotiation” Begins To Emerge, in THE NEGOTIATOR’S FIELDBOOK, supra note 131, at 1 (proposing to expand traditionally private theories of negotiation into a social praxis of “peacemaking . . . at many levels”); Joseph B. Stulberg, Questions, 17 OHIO ST. J. ON DISP. RESOL. 531, 534 (2002) (suggesting that, although once debatable, evidence now supports the idea that mediation is appropriate for “complex . . . social controversies of our time”).

138. *See, e.g., Crespo, supra note 121 (arguing that ADR-like consensus-building processes can enhance citizen participation in governance and the legitimacy of political outcomes); Nancy D. Erbe, Appreciating Mediation’s Global Role in Promoting Good Governance, 11 HARV. NEGOT. L. REV. 355, 357 (2006) (arguing that “mediation advances good governance, at micro and macro levels of society, by heightening inclusive participation, egalitarian decision-making, and stakeholder responsiveness”).*

139. *See, e.g., Gemma Smyth, Considering Democracy and ADR: Diversity Based Practice in Public Collaborative Processes, 19 WINDSOR REV. LEGAL & SOC. ISSUES 13 (2005) (reviewing a substantial amount of recent scholarship suggesting that ADR can enhance the extent and quality of democracy in a society).*

140. *See, e.g., Schneider, supra note 125, at 309–10, 313–15 (proposing to extend ADR values, such as individual participation and self-determination, to design “more victim-focused” truth commissions and international tribunals).*

141. *See, e.g., supra notes 120–21 and accompanying text; see also Christopher Gibson & Michael Woolcock, Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy (World Bank Policy Research, Working Paper No. 3713, 2005), available at <http://ssrn.com/abstract=806225> (exploring whether collaborative extrajudicial conflict resolution can enable lower-status parties to challenge elite interests).*

142. Amy Gutmann, *How Not To Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 1 (1999).

143. *Id.* at 6–8 (characterizing the work of Roger Fisher and his coauthors). For Gutmann and her coauthor Dennis Thompson, beyond procedural fairness and consensual agreement, principles of “basic rights” and “basic liberty and opportunity” must inform “what counts as a morally legitimate resolution of disagreement.” AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 17 (1996).

they adopt deliberative democratic principles, such as reasoned arguments “grounded in legitimate moral visions.”¹⁴⁴ For Seul, ADR, recast as principled deliberation, can and should contribute to “our nation’s moral discourse and the evolution of social norms.”¹⁴⁵

Other theorists respond to these arguments by seeking to preserve ADR’s skeptical orientation towards the emancipatory capacity of moral reasoning. Hiro Aragaki cautions ADR proponents against too readily adopting the methods and principles of deliberative democrats, most notably their idea that “marshaling evidence and reasons” is the “appropriate response to conflict.”¹⁴⁶ For Aragaki, it is precisely ADR’s willingness to bracket antecedent moral criteria that enables the production of workable, negotiated compromises that satisfy actual human needs and interests.¹⁴⁷ Adding to (and perhaps mediating) this conversation, Carrie Menkel-Meadow recently linked new forms of public policy ADR to the principle that a “moral norm is valid only insofar as it wins assent of the people concerned.”¹⁴⁸ She proposed, moreover, that deliberative practitioners should accept bargaining and interest-based trades, alongside justificatory and universalizing appeals to reason, as legitimate methods to settle matters of public concern.¹⁴⁹

These debates take place largely without reference to Fiss’s work. Nonetheless they suggest that twenty-five years after the publication of *Against Settlement*, Fiss’s arguments hold renewed salience for the discipline. It would even seem that today ADR scholars could choose to read Fiss more as a mirror than as an adversary. We could ask how our own endorsements of consensual dialogic processes reflect continuities, as well as breaks, with his liberal ideals. Or, to put this point another way, Fiss’s arguments reveal central tensions not between adjudication and ADR but *within* the discipline of ADR itself as it presently understands its own moral and political commitments.

Indeed, I suspect many contemporary ADR proponents are likely to read *Against Settlement* more sympathetically and more ambitiously than their predecessors, perhaps as a provocation to realign their institutional problem-solving techniques with a mandate to produce public values and

144. Seul, *supra* note 7, at 963, 964 (drawing on principles developed by Gutmann and others).

145. *Id.* at 881.

146. Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407, 412 (2009).

147. *Id.* at 412–14.

148. Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 70 (2002) (quoting CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 110 (1996) (discussing and citing JÜRGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43–115 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990))).

149. *Id.* at 76–77; Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 365–66 (2004–2005).

advance a social-moral good.¹⁵⁰ If they misapprehend Fiss's overarching social concerns, they may assert that demonstrating ADR's functional capacity to produce public values itself constitutes a repudiation of his central claims. If they reject Fiss's epistemological orientations, they may question whether one can ever separate moral truth from social practice. But we can all agree that it is *possible* for ADR to animate individuals and communities to resolve conflicts according to collective moral standards (however these are defined). This essay suggests that whether and how ADR should, are questions traceable to Fiss—even if I defer their analysis for another day.

I have argued that Fiss's overarching allegiance is less to specific institutional forms than to particular universalizing moral ideals—for him, the institutions are more contingent, the moral values more constant. That said, my own inclination is to resist any straightforward or redemptive shift in focus from institutions to values. I also argued that Fiss framed his moral claims from within and against particular political and historical conditions. In fact, I read *Against Settlement* as deeply contextual and historical. I proposed that Fiss's decisions for and against legal and extralegal processes reflected, first, a set of substantive commitments to the U.S. welfare state and, second, a broader social project to combat the global spread of neoliberalism. Recognizing the historically situated character of Fiss's arguments suggests that those of us who share Fiss's social aims should, like Fiss, continuously reevaluate the social contexts within which we labor.

In 1984, Fiss saw a clear line between the (old) state and the (new) market, and he proposed to deploy moral values embodied in law—sacred, incommensurable, noninstrumental and noninstrumentalizable—as a strategy to “strengthen our resolve to resist” the penetration of market rationalities into spheres of public governance and social life.¹⁵¹ That is, he aimed to preserve the institutional authority to make, and the popular will to endorse, decisions about matters of distribution, rights, and entitlements without relying on utilitarian calculations or interest aggregation. To that end, he proposed that U.S. judicial institutions could help “bring . . . into

150. See, e.g., *supra* note 7. Lawrence Susskind and Jennifer Brown recently developed a teaching tool to engage students in the possibilities and challenges of mediating values-based legal disputes. See *Williams v. Northville*, Teacher's Package, Program on Negotiation at Harvard Law School (2009) (prepared by Kate Harvey & David Kovick, supervised by Lawrence Susskind & Jennifer Brown) (on file with the Fordham Law Review); see also Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty* 2 (2009) (unpublished manuscript, on file with author) (“[M]ediation holds tremendous potential in legal disputes that pit ‘gay rights’ against ‘religious liberty.’”); Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contested Parades in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133, 133 (2006) (arguing that ADR institutions can “build consensus about the conception of justice underpinning public life, and so provide societies with ‘morally defensible processes’ capable of responding to conflict in politics” (citing Gutmann, *supra* note 142, at 1)).

151. Fiss, *The Death of the Law?*, *supra* note 30, at 15.

being” (that is, bring into our social reality) countervailing ideals of “true and substantive equality.”¹⁵²

Today, however, as we confront the rapid blurring of the state and the market, critical analysts regularly observe that cultivating commitments to social-moral values can entrench as much as displace social hierarchies and can advance as much as constrain markets as a dominant form of social ordering.¹⁵³ Indeed, it takes little imagination to appreciate that, for some, a free market economy is a moral claim—an end of human flourishing, not only a means.¹⁵⁴ It perhaps requires only a bit more imagination to envision how the translation of moral values into abstract, universal rights, equally applicable to all, can intersect with local conditions of privilege and oppression to produce decidedly unequal outcomes on the ground,¹⁵⁵ or can foster depoliticized and individualistic ideals of selfhood—what some scholars call “neoliberal human rights.”¹⁵⁶

But to suggest that universalizing moral values and legal rights may advance multiple and contradictory social projects is not to reject Fiss’s anti-neoliberal aims. Nor is it to reject the deployment of dispute processing institutions or moral-legal values in the pursuit of emancipatory social ideals.¹⁵⁷ To the contrary, the lesson I draw from critical analysts of

152. *Id.* at 13.

153. See Ronen Shamir, *Corporate Social Responsibility: Towards a New Market-Embedded Morality?*, 9 THEORETICAL INQUIRIES L. 371, 373 (2008) (describing a general “moralization of economic action” that reframes social and environmental concerns from within market principles); see also FINE, *supra* note 89, at 168–69 (characterizing neoliberalism’s recent attention to social objectives as “the colonisation of the non-economic by the economists,” and as a “severe setback to development studies”); Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 90, at 203, 233 (“Social objectives are embraced [by international financial institutions] not only because they are human rights or are socially desirable, but because they enhance growth. . . . [Thus] those that appear to most directly enhance the extent and quality of market participation . . . are preferred over those that do not.”). Fiss himself grapples with a similar set of observations in *The Autonomy of Law*. See *supra* notes 92–93 and accompanying text.

154. Consider Andrea Muehlebach’s recent study of the privatization of care work in Italy. She illustrates how the erosion of the Italian welfare state includes not only social atomization and commodification, but also the promise of moral community, ethical labor, and face-to-face altruism. Andrea Karin Muehlebach, *The Moral Neoliberal: Welfare State and Ethical Citizenship in Contemporary Italy* (June 2007) (unpublished Ph.D. dissertation, University of Chicago), available at <http://gradworks.umi.com/32/62/3262273.html>.

155. Indeed, David Kennedy argues that it is precisely because human rights must maintain the claim to universality and neutrality, [that] the human rights movement practices a systematic lack of attention to background sociological and political conditions which will determine the meaning a right has in particular contexts, rendering the evenhanded pursuit of ‘rights’ vulnerable to all sorts of distorted, and distinctly non-neutral outcomes.

David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 2001 EUR. HUM. RTS. L. REV. 245, 253.

156. See generally MARK GOODALE, *SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS* 115–27 (2009) (discussing various conceptual and political challenges involved in constructing doctrines of collective human rights).

157. On this point, Susan Marks’s analysis strikes me as exactly right. She writes, “indeterminacy and its antipode, determinacy, are not properties of . . . law. Rather, they are

human rights is the *same* lesson I draw from Fiss: the necessity of relentlessly examining the changing historical contexts, macropolitical struggles, and normative social ends within which we want institutions *and* values to accomplish particular work. For this reason, I have read *Against Settlement* not as institutional prescription or as moral truth but as political critique. And as political critique, the irresolvable challenge that endures is not ADR versus adjudication, or, for that matter, interests versus values, but rather the recognition that our moral values, like our institutional tools, are shaped by the social conditions we would use them to transcend.

arguments, the emancipatory force of which is not fixed, but context-dependent.” Susan Marks, *International Judicial Activism and the Commodity-Form Theory of International Law*, 18 EUR. J. INT’L L. 199, 199 (2007).